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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 241.

MOTORS INSURANCE CORPORATION, a corporation, THE AVONDALE MOTOR CAR COMPANY, a corporation, and JOHN L. CASHMAN, for themselves and others similarly situated,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, as Superintendent of Insurance of Ohio and WILLIAM HARPER ANNAT, as Director of Commerce of Ohio,

Defendants-Appellees.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

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WALTER A. ROBINSON, as Superintendent of Insurance of Ohio and WILLIAM HARPER ANNAT, as Director of Commerce of Ohio,

Defendants-Appellees.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

Pursuant to Rule 33 of the rules of this Court and within the time as enlarged by order of Mr. Justice Reed dated October 28, 1952, plaintiffs-appellants, Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman, for themselves and others similarly situated, pray that this Court grant rehearing of its decision, filed October 13, 1952, granting the motion to dismiss and dismissing the appeal in the above-entitled case and that the Court decide that there is probable jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered therein.

Reasons for Granting Rehearing and for Noting Probable Jurisdiction.

It is respectfully submitted that the questions raised in this case are of such novelty and commanding public importance as to warrant a decision, upon reconsideration, that they are clearly substantial in the light of all of the standards of substantiality heretofore announced by this Court and that a reasoned opinion in this case is warranted.

Appellants felt that their Jurisdictional Statement and brief in opposition to appellee's motion to dismiss or affirm made it sufficiently plain that the Ohio statutes here involved are, *as construed and applied*, completely unique. Nowhere in the legislation of the several states with the exception of the New York statute condemned in *Hauser* v. *North British Mercantile Insurance Co.*, 206 N. Y. 455, 100 N. E. 52, and the thoroughly distinguishable South Carolina statute upheld in *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, is there to be found a statute which either on its face or in practical effect, as applied, excludes persons connected with a particular business such as the sale of automobiles from the privilege of acting as agents for insurance companies. Nowhere in the legislation of the several states is there to be found a disqualification for licensure predicated upon the *principal use* of the agent's license to sell insurance to customers of his mercantile business in respect to property sold to them.

Appellants feel that the issues raised are substantial in the context of decided cases. Appellants are certain that a plenary brief and argument will demonstrate this to be so beyond question and will demonstrate also that the result of this case, if allowed to stand, will mark a point of departure in the application of the due process and equal protection principles.

The opinion of the Common Pleas Court of Franklin County, Ohio, is the only one which contains any discussion of the statutes as construed and applied by the appellees. Appellants believe that that opinion makes entirely clear that the sole purpose and effect of the challenged construction is to discriminate unjustly and without reason against persons engaged in the automobile sales business and to promote solely the private interests of a group of competing insurance agents. Appellants are not aware of any decision of this Court sustaining the validity of any such statute or construction.

The case is of immediate importance not only to the approximately 1,100 former insurance agents previously licensed by Motors Insurance Corporation in Ohio and to the many Ohio citizens connected with the automobile sales business who also desire—for the same reasons as do persons contemporaneously engaged in the real estate and insurance businesses—to be licensed as insurance agents and sell automobile insurance to persons who have purchased cars from them: The case is of vital importance to and its result adversely affects the interests of the automobile insuring public of that State.

But apart from the public importance of this case, it is submitted that the constitutional questions it raises are not "wholly formal" or "so absolutely devoid of merit as to be frivolous" or "so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy". *Chanute City* v. *Trader*, 132 U. S. 210; *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308; *Zucht* v. *King*, 260 U. S. 174. Nor can it be said that each of the questions here raised requires no "analysis and

exposition for its decision". *Milheim* v. *Moffat Tunnel Improvement District,* 262 U. S. 710, 716-17.

Appellants have not presented a "mere gossamer claim" and this Court's prior decisions would surely appear "still [to] leave decent room for argument regarding the applicability of former rulings" to this case. Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936,* 51 Harv. L. Rev. 577, 589, 592.

The very fact that three of the seven members of the Ohio Supreme Court did not concur in that tribunal's decision that no "debatable constitutional question" was involved would seem to militate against summary disposition of the constitutional issues here raised. This is particularly so because of the necessity for analysis in order to demonstrate the irrationality and invalidity of the construction here upheld as well as the absence of any prior decisions foreclosing—explicitly, plainly, or even inferentially—these issues. As stated in *Louisville & Nashville Railroad Co.* v. *Melton,* 218 U. S. 36 (at pp. 49-50):

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, *a*,

> because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *b*, because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and, *c*, because while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power consistently with the equal protection of the law clause to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review as construed below is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

Where, as here, the issues would plainly seem to "involve an element of novelty", summary adjudication at least results in an insufficiently defined extension of, if not—as counsel for appellant believe it does—a complete departure from, previous decisions. Moreover, "Behind the desire to be heard and to be told, lies solid experience" and appellants are sure that a "full hearing and the necessity of giving explicit reasons" will in this case "affect judgment". Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938,* 53 Harv. L. Rev. 579, 601, 604, 605. See also, Ulman and Spears, *"Dismissed for Want of a Substantial Federal Question",* 20 Boston Univ. L. Rev. 501, 529, 531 and Note, *The Insubstantial Federal Question,* 62 Harv. L. Rev. 488, 493, 494, 496.

Conclusion.

For the reasons set forth above and in the appellants' Statement as to Jurisdiction and brief in opposition to appellees' motion to dismiss or affirm, it is respectfully urged that rehearing be granted and that, upon such rehearing, this Court decide that there is probable jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered herein.

Respectfully submitted,

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Dated: November 7, 1952

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CLARENCE D. LAYLIN
J. ROTH CRABBE
Counsel for Appellants

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Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND WILLIAM HARPER ANNAT, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees.

RESPONSE TO PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

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Defendants-Appellees.

RESPONSE TO PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

Pursuant to Rule 33 of the rules of this court the defendants-appellees, Walter A. Robinson, as superintendent of

insurance, and William Harper Annat, as director of commerce of the state of Ohio, respond herewith to the petition for rehearing of decision granting motion to dismiss and dismissing appeal in the above-entitled case.

It is respectfully submitted that no new questions or arguments are contained in the petition for rehearing. No principles of law nor statements of fact which were not fully argued and asserted in plaintiffs-appellants' prior brief are contained in the petition for rehearing; the petition for rehearing being solely a restatement of arguments previously presented.

This response becomes necessary, however, because of misleading inferences to be drawn from certain statements found on pages 2 and 3 of the petition to the effect that:

(a) No other state statutes comparable to the Ohio statutes may be found.

This is an unwarranted conclusion. Such other state statutes are set out on pages 9, 10, 11 and 12 of defendants-appellees' statement opposing jurisdiction.

(b) The Ohio statute excludes persons connected with the automobile business from the privilege of acting as agents for insurance companies.

This likewise is not the fact. The Ohio statutes simply require all insurance agents, no matter what other occupations or business they pursue not to use their licenses principally to write "controlled business."

(c) The statement that the opinion of the Common Pleas Court of Franklin county, Ohio, is to the effect that the Ohio statutes discriminate unjustly against persons engaged in the automobile sales business and promote the private interests of a group of competing agents.

The trial court in part had this to say with reference to that point:

> "The statute under consideration does not deprive any class, group or individual from securing an insurance license if he has the necessary qualifications and intends to use his license to conduct a general insurance business, qualified only by the provision that the license is not to be used primarily to effect insurance on his own property, or that of relatives, employees, employers, or that for which they or the licensee are or is agent, custodian, vendor, bailee, trustee or payee.
>
> It, therefore, cannot be successfully maintained that the effect of the statute is to deprive anyone from the right or ability or opportunity to secure a license to sell insurance."

Counsel for plaintiffs-appellants persist in referring to a **group** of competing agents. The only **group** involved consists of automobile dealers. All other licensees of the department, whether full time or part time agents and no matter how otherwise engaged, are required to comply with the "principal use" provisions of the Ohio statutes. Petitioners' complaint actually arises by reason of the refusal of the insurance department and the courts to exempt their one small group from the requirements of the statutes involved.

CONCLUSION.

Appellees respectfully submit that appellants' petition for a rehearing should be denied.

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